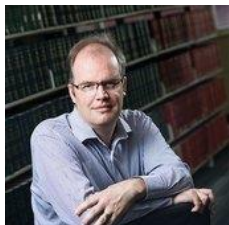


A mercurial treaty: the Trans-Pacific Partnership and the United States

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Disclosure statement

Dr Matthew Rimmer is an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. He is an associate professor at the ANU College of Law, an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA), and a director of the Australian Digital Alliance. Dr Matthew Rimmer receives funding as an Australian Research Council Future Fellow working on "Intellectual Property and Climate Change: Inventing Clean Technologies" and a chief investigator in an Australian Research Council Discovery Project, "Promoting Plant Innovation in Australia".



Leaders of the member states of the Trans-Pacific Strategic Economic Partnership Agreement (TPP) from 2010. Gobierno de Chile/Wikimedia Commons

According to the [United States Trade Representative](#) (USTR), Ron Kirk, the Trans-Pacific Partnership is "an ambitious, next-generation, Asia-Pacific trade agreement that reflects U.S. priorities and values".

The negotiating partners for the treaty include a selection of countries from the Pacific Rim: Australia, New Zealand, Brunei Darussalam, Malaysia, Singapore, Vietnam, Chile and Peru. There has been much discussion about whether Canada, Mexico, and Japan will join the agreement. And [USTR Ron Kirk](#) has observed that the treaty has open architecture to accommodate new members.

Although the draft text remains largely secret, the [outline](#) indicates that the agreement is wide-ranging, covering some 20 areas, including competition, customs, e-commerce, intellectual property, investment, industrial relations, and trade.

According to the [USTR](#), the treaty is intended to be a “living agreement” that can be updated to “address trade issues that emerge in the future as well as new issues that arise with the expansion of the agreement to include new countries.” The danger is it could instead be a mercurial treaty, which could be rapidly revised and updated by the parties.

Even within the United States, there are tensions between the Obama administration and the Congress over the Trans-Pacific Partnership - particularly in respect of the impact of the treaty upon open government, intellectual property, the digital economy, and public health. There has been a furore this week about [the leak of the investment chapter](#) of the Trans-Pacific Partnership.

Undermining open government

There has been widespread concern about the lack of transparency, due process, public participation, and good governance surrounding the Trans-Pacific Partnership in the United States.

A Democrat senator, Ron Wyden, has introduced a bill calling for all members of Congress, together with staff who have proper security clearance, to be given access to “documents, including classified materials, relating to negotiations for a trade agreement to which the United States may be a party and policies advanced by the Trade Representative in such negotiations.”

His aim: “Put simply, this legislation would ensure that the representatives elected by the American people are afforded the same level of influence over our nation’s policies as the paid representatives of PhRMA, Halliburton and the Motion Picture Association.”

Meanwhile, [a group of law professors](#) have issued a statement to note concern and disappointment over the secrecy surrounding the IP chapter of the agreement. They’ve asked for increased participation for the sake of legitimacy and fairness, “if the goal is to create balanced law that stands the test of modern democratic theories and practices of public transparency, accountability and input.”

The [USTR](#) has dismissed such allegations regarding the lack of transparency and public participation. But civil society groups have pressed their point, interrupting the Dallas talks with political theatre. [The Yes Men](#) infiltrated the Dallas meeting, and awarded Ron Kirk with a “Corporate Power Tool” in a fake ceremony:

Copyright law, the digital economy and cloud computing

There's also concern that the intellectual property chapter of the Trans-Pacific Partnership represents a similar threat to civil liberties, innovation, and the digital economy as those posed by bills such as [Stop Online Piracy Act](#) (SOPA) and [Protect Intellectual Property Act](#) (PIPA).

Republican Californian representative, Darrell Issa, has established a website called [Keep the Web Open](#). He has posted a [leaked version](#) of a 2011 Intellectual Property Chapter of the Trans-Pacific Partnership, and called for public comment and criticism of the proposed text.

[But for his part](#), USTR Ron Kirk has maintained the agreement "reflects the incentives and stable framework that can nurture a healthy digital environment in the Asia-Pacific region." He has argued that the treaty provides safe harbours for cloud computing. However, his purported "safeguards" in respect of copyright law and the digital environment remain somewhat hazy and vague.

Congressmen Issa and Wyden have instead called for the creation of a substantive [Citizens' Digital Bill of Rights](#). The [draft](#) calls for an open internet; a free flow of knowledge; and the protection of civil liberties, free speech and privacy.

Patent law and access to essential medicines

There have also been concerns that the Trans-Pacific Partnership unduly favours brand-name pharmaceutical drug companies. Senior Democrat Congressman Henry Waxman - a co-author of the [Hatch-Waxman Act](#) - has spoken out over the impact of the patent provisions in the treaty on public health.

[Waxman](#) has observed that the United States Congress negotiated safeguards for public health in trade agreements with the Republican Bush Administration and complained that the Democrat Obama Administration hasn't included such measures in the Trans-Pacific Partnership.

Waxman has noted that the agreement would mean poor countries would wait longer for access to generic drugs than patients in the United States and that it would allow large pharmaceutical companies to increase their profits in developing nations. He has suggested that the agreement needs to be rewritten to ensure "a reasonable mix of incentives for innovators that do not pose unnecessary barriers to poor patients seeking access to low cost generic medicines."

But the USTR has taken a [hard line on intellectual property and access to essential medicines](#). It is genuinely shocking that the Obama administration should adopt such a stance on global health. Perhaps the Democrats have forgotten the public backlash against presidential candidate [Al Gore's controversial stance on patent law and medicines](#) in 1999.

Trade mark law and tobacco control

When, Australian Attorney-General Nicola Roxon [visited Washington DC](#), extolling the virtues of the [plain packaging of tobacco products](#), earlier this year, Waxman raised concerns about the impact of the Trans-Pacific Partnership on tobacco control measures.

Waxman stressed, “Australia, a Trans-Pacific Partnership partner, has similarly faced challenges in the World Trade Organization to its tobacco control initiative that will require more visible health warnings and so-called plain packaging on tobacco products.”

In light of recent trade challenges to U.S. and Australian tobacco control laws, Waxman emphasized, “In my view, it is essential to safeguard countries’ sovereign authority to take the most appropriate and most feasible action to protect the health of their citizens.” He insisted that the Trans-Pacific Partnership must respect the principles and objectives of the [World Health Organization Framework Convention on Tobacco Control](#).

Surprisingly, USTR Ron Kirk has equivocated on the issue of safeguards on tobacco control in the Trans-Pacific Partnership, as can be seen in this video:

And there has been unease in Australia about whether the integrity of its [plain packaging regime will be protected](#).

Investment

On the 13th June 2012, the investment chapter of the TPP was [leaked to the US civil society group, Public Citizen](<http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3630>)(<http://www.citizen.org/pressroom/pressroomredirect.cfm?ID=3630>). The [investment chapter](#) provides substantive legal protections for investors and investments of each partner in the other countries of the Trans-Pacific Partnership.

The treaty establishes an “investor-state” dispute resolution settlement under which companies could seek compensation where there are breaches of their rights under the Trans-Pacific Partnership. There are [particular concerns about how such a regime would apply to public health, labour, and the environment](#). Australia has refused to submit to such a regime in the Trans-Pacific Partnership thus far.

Investment clauses are widely used in disputes between companies and governments with previous spats over [energy](#) and against the Australian government over [tobacco control](#).

With [the leak of the investment chapter](#), the Obama administration stands accused of breaking its 2008 campaign promises on trade policy.

The leaked [investment chapter](#) has created a wider international controversy. The chapter appears to confirm fears that the treaty enhances corporate rights at the

expense of public goods and services - such as the intellectual commons; affordable access to medicines and public health; and the protection of the environment.

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